

General Information Letter: Based on the facts shown in the request, no ruling can be issued stating that the taxpayer has no nexus with Illinois.

June 18, 1999

Dear :

This is in response to your letter dated May 17, 1999. Given the nature of your inquiry and the information you provide, I am responding with a General Information Letter. This is not to be taken as a statement of Department policy or as a binding ruling by the Department. As general information gathered in response to your particular questions, however, I hope that it is helpful to you. See 86 Ill. Adm. Code 1200.120(b) and (c).

In your letter you have stated the following:

xx is requesting from your state a binding letter of determination that no income, franchise, intangible returns or annual reports are required to be filed with your state. If you determine that any of the above returns or reports are required we would like a copy of the applicable statute along with the appropriate forms with instructions.

FACTS :

xxx is a xxxxxxxx "C" Corporation based in xxxxxxxx, xxxxxxxx. The only employees working for the company are in xxxxxxxx and we do not have an office, any fixed assets, P.O. Box, telephones, or any other company assets outside the state of xxxxxxxx. xxx only facilitates the sale of viatical settlement purchases, the bringing together of a Seller/"viator" (a terminally ill person) and the Purchaser/buyer. In an abundance of caution we have secured a license or certificate of authority to conduct business in your state. xxx contracts with independent insurance sales agents to market viatical settlement agreements in your state. We inform brokers of our services and those brokers may live in your state or make contacts with prospective buyers or sellers in your state.

xxx does not initiate contact with any viators, (terminally ill individuals-policy holders) wishing to sell their life insurance benefits. When the policy is sold, the independent broker receives a commission. This commission is negotiated between the policy owner and their broker. After a contract for the sale of the life insurance policy is signed, the Life Insurance Company of the policy holder is contacted by xxx. After the transfer of policy ownership is completed, via a bonded title company in xxxxxxxx, disbursements are made to all concerned parties from an escrow account.

Investor funds are maintained with a xxxxxxxx title company escrow account until the closing is completed. xxx is compensated for its assistance in securing a matching viatical settlement. We presume that tax reporting will not be required but need written confirmation and, thus, we appreciate your immediate attention to this matter and await your response.

**Response**

If a business taxpayer establishes nexus in Illinois as a result of its business activities here, then it will be considered to be "doing business" in the state and will have to file returns and pay relevant state taxes. You request a binding letter on this issue, but this Department does not provide rulings on nexus outside the context of an audit, where the auditor is able to examine all specific facts relevant to his determination.

It is possible to say that Illinois follows the current constitutional due process and commerce clause jurisprudence to determine nexus. The leading case is the U.S. Supreme Court ruling in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992). That case found that the two clauses have differing criteria. The due process clause is satisfied if the business purposely avails itself of the benefits of an economic market in a forum state. The commerce clause requires that the business must have a physical presence in the forum state.

A physical presence does not require an office or other physical building. Under Illinois law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative. It may be an independent agent. In addition, for sales of intangibles, at least two prominent states, Michigan and New York, have used the recent opinion in *Quill* as the minimum standard of activity necessary to be "doing business" within a state for purposes of taxation.

The Michigan case, *Magnatek Controls v. Department of Treasury* (221 Mich. App. 400, 562 N.W.2d 219 (1997)), found that only two weeks of sales activities by a Michigan company in another state had established sufficient jurisdictional nexus in the other state to make it subject to taxation. In New York, the opinion in *Orvis v. Tax Appeals Tribunal* (86 N.Y.2d 165, 654 N.E.2d 954 (1995)) found that four visits to nineteen customers in one year was enough to allow the state to tax the Vermont wholesaler.

You appear to be selling an intangible and you will have sales to Illinois customers. This activity could be enough to overcome the "slightest presence" threshold announced in *Quill* for constitutional nexus. If nexus were established for income tax, the apportionment of income to Illinois would ultimately depend upon how the sales factor would be measured. If the "income producing activity" leading to Illinois sales, measured by performance costs, were found to be proportionally greater in this state than elsewhere, then all sales of the service to Illinois customers would fall in this state's sales factor for apportionment of income (IITA § 304(a)(3)(C)(ii)).

As stated above, this is a general information letter which does not constitute a statement of policy that either applies, interprets or prescribes tax law. It is not binding on the Department. If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Sincerely,

Kent R. Steinkamp  
Staff Attorney -- Income Tax